# No. 10,525

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

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CHAN CHAUN,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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## BRIEF FOR APPELLEE.

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## BRIEF FOR APPELLEE.

### JURISDICTIONAL STATEMENT.

This is an appeal from the judgments of conviction (Tr. 13-15 and 86-87) of the District Court of the United States for the Northern District of California, Southern Division, convicting the appellant on two indictments (Tr. 2-5 and 81) charging him with a violation of Section 174 of Title 21 United States Code in that he concealed and facilitated the concealment of certain opium and yen shee. After a plea of not guilty a jury trial was had and the appellant was convicted.

The Court below had jurisdiction of this case under and pursuant to the provisions of Title 21, United States Code, Section 174. The jurisdiction of this Honorable Court is invoked under the provisions of Title 28, United States Code, Section 225, subdivision (a).

**STATEMENT OF CASE.**

Appellant's statement of the case is substantially correct and, rather than burden the Court, we will accept it as ours, with one correction. Appellant, evidently inadvertently, makes the following statement (Appellant's Opening Brief, p. 2, paragraph 4):

> "The subject matter of both the indictment in the Northern Division and in the Southern Division were the same. The facts out of which the alleged violation arose was the transportation of the narcotics in question through the Northern Division and into the Southern Division of the District."

An examination of the indictments and of the Transcript of Record clearly shows this statement to be incorrect.

The indictment returned in the Northern Division charged that the defendant, on the 1st day of December, 1942, at Davis Junction in the County of Yolo, within the Northern Division, concealed and facilitated the concealment of 80 ounces of smoking opium contained in 12 five-tael brass cans.

The indictment returned in the Southern Division charged that the defendant concealed and facilitated the concealment of one ounce and 180 grains of smoking opium and 220 grains of yen shee on the 9th day of December, 1942, at San Francisco, within the Southern Division.

It is apparent that the "subject matter" of these two indictments could not be "the same", inasmuch as the acts charged occurred on different dates and

in different places. The opium or the residue thereof could not be the same, as the opium involved in the transaction at Davis Junction did not come into the hands of the appellant at San Francisco.

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## QUESTION.

There is only one question raised by this appeal.

Is the evidence sufficient to sustain the verdict of the jury?

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## A SUMMARY OF THE EVIDENCE.

Appellant's summary of the evidence is necessarily quite lengthy and substantially correct except that certain evidence favorable to the appellee has been minimized. Rather than burden the Court with another summary equally lengthy, we take the liberty merely to comment upon that of the appellant, by calling attention to and emphasizing the evidence which, we feel, aids in sustaining the verdict.

Dwyer H. Skemp testified that the Greyhound Bus upon which he found the suitcase containing the narcotics had arrived in California from Portland, Oregon. He positively identified the bag which was introduced into evidence as the bag which he had examined and which had contained the opium.

C. T. Cass identified the suitcase which was introduced into evidence as the suitcase which he had examined at Davis Junction and in which he found

the 12 tins of opium. He also identified the tins which were removed from the suitcase as being the tins of opium which he had delivered to the United States chemist and which were introduced into evidence. Further, that he accompanied the expressman who delivered the suitcase to 717 Grant Avenue and that in the presence of the defendant Mr. Pon Wai, pointing to the defendant, said "that is the man that gave me check 9-37-21." Also that check 9-37-21 was the number of the check which was attached to the suitcase at all times.

Timothy Leong testified that the check which he took to the Greyhound Depot had been given to him by his boss, Frank Dun and that there was attached to it a tag reading "H. W. Tai" which means Hing Wah Tai Co. the place where he delivered the suitcase.

Pon Wai testified that it was the appellant, Chan Chaun, who told him to take the check and pick up the suitcase.

Frank Dun testified that the baggage check which he received was given to him by Pon Wai.

Leonard G. Titus testified that the baggage check which was introduced into evidence was the check which was presented to him by Timothy Leong. Also that a person might check baggage on a bus and not actually be a passenger on the bus so long as he had a passenger ticket.

Thomas C. McGuire testified that both Chan Chaun and Pon Jeung were questioned in his presence at 717 Grant Avenue and at that time they both spoke

in English. Also that in his presence, and in the presence of the appellant, Pon Jeung stated that the opium and yen shee found on the premises belonged to the appellant.

John Connolly testified that he has been a member of the Chinatown Squad of the San Francisco Police Department for several years and that he is familiar with the premises located at 717 Grant Avenue; that the only persons to his knowledge who lived on the premises were Pon Jeung and Chan Chaun, the appellant.

John J. Manion testified that he has been in charge of the Chinatown Squad of the San Francisco Police Department for the past twenty-two years. Also that he had several conversations with the appellant on the day in question and that all of these conversations except one were in English. Also that he had a conversation with Pon Jeung in English.

Joseph A. Manning testified that he had conversations with the appellant and Pon Jeung in English. Also that, when Pon Wai confronted the appellant Pon Wai insisted that he had received the baggage check from the appellant.

Pon Yin Jeung testified by the use of an interpreter and denied that he spoke English.

Chan Chaun, the appellant, testified by the use of an interpreter and denied that he spoke English. He testified that he had never seen the man known as Wong before he gave him the baggage check and that he has not seen him since.

**ARGUMENT.**

There can be no question that the suitcase containing the opium can be traced back to the appellant by an unbroken chain of circumstances. Pon Wai testified he received the check from the appellant and gave it to Frank Dun, the manager of the Canton Express Co.; Frank Dun stated that he gave the check to his employee, Timothy Leong; Leong stated he claimed the suitcase by means of the check from the Greyhound Bus Depot. This evidence stands uncontradicted. In fact, the appellant admits that he gave the check to Pon Wai but attempts to explain his possession of it by some vague story of having received it from a man by the name of Wong—a man whom he had never seen before and has not seen since. By his own admission, this man is a complete stranger to the appellant, he cannot identify him, he came to him unrecommended, he was not introduced by any mutual acquaintance—he is merely an unknown man, whom he met on one occasion at the Bing Tong Building on Waverly Place.

Appellant argues that unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the jury to acquit. We admit that this is the general rule, but only when the defendant, himself, does not offer an hypothesis in explanation of the facts adduced against him. If the defendant elects to remain silent, then the Government must prove a case which excludes every reasonable hypothesis except that of guilt. On the other hand, when the defendant takes the witness stand and offers an explanation of his conduct, the

judge or jury need not weigh the Government's case against *any* reasonable hypothesis but must weigh the case presented by the Government against the explanation offered by the defendant.

*Ferris v. United States,* 40 Fed. (2d) 837;
*Chass v. United States,* 258 Fed. 911, 914;
*Rosengarten v. United States,* 32 Fed. (2d) 644.

In the case at bar, the Government placed the defendant in the Northwest at a time when he could easily have checked the suitcase full of opium. In this connection, we respectfully call the Court's attention to the appellant's testimony concerning the dates of his presence in Portland, Oregon (Tr. p. 68), and the evasive manner in which he first stated he was in Portland on November 30, and then, only after suggestion by his counsel, changed the date to October 30. Then the Government, by uncontradicted testimony and by the appellant's own admission connected him up with the claiming of the suitcase at San Francisco by means of the baggage check.

As opposed to this, the appellant offers no better explanation than that he received the check from an unknown man, whom he had not seen before nor since, whom we cannot identify and who disappeared from the scene as silently as he came in. He offers no explanation as to why a perfect stranger would trust him with a baggage check to a suitcase containing $33,000.00 worth of opium (Tr. p. 58); he had no arrangement with the stranger for the delivery of the bag once he had received it; he had no idea where he could find the stranger to deliver the bag if he had been successful in obtaining it.

Furthermore, we cannot separate the two episodes covered by the two indictments. The one lends weight to the other. In the one case we have a man indisputably connected with a shipment of opium from Portland, Oregon to San Francisco. In the second case when the bag is delivered to his place of residence we find opium, yen shee and opium smoking apparatus in close proximity to the room in which he lives. The fourth floor of 717 Grant Avenue is an open loft; on one side is a small room occupied by the appellant and on the other, an open kitchen where the cook Pon Jeung is employed. Opium and yen shee is found concealed in the kitchen. The appellant is confronted with the cook and the cook flatly states that the opium and the yen shee belong to the appellant. Most important of all, when so confronted and so accused, the appellant stands silent; he does not deny the cook's damaging accusation.

These two transactions cannot be separated. Clearly the evidence was sufficient to warrant a decision by the jury. In this connection we invite the Court's attention to the accepted rule that the verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.

*Glasser v. United States,* 115 U. S. 60, 81.

The case of *Ching Wan v. United States,* 35 Fed. (2d) 665, relied on by appellant, can be easily distinguished from the case at bar. Appellant, inadvertently, asserts that the judgment as to the defendant Ching Wan was reversed. This is not so. In that

case, a co-defendant, who had merely driven an automobile in which the defendant transported a box containing narcotics was convicted of facilitating the transportation of narcotics. The Circuit Court properly reversed his conviction for insufficiency of evidence because it was not shown that he was more than a mere "conduit" and there was no evidence of guilty knowledge on his part.

Here the case is entirely different. The appellant was shown to have had at least constructive possession of the narcotics. He was in a position to have shipped it and, if the agents had not intervened, would have had actual possession of the narcotics upon delivery at 717 Grant Avenue. The Statute itself (21 U.S.C. 174) places the burden upon him to explain his possession to the satisfaction of the jury.

Finally, we come to a most compelling argument and that is the one based on the credibility of witnesses. The rule is so general as to be accepted without the necessity of citation, that the jury is the sole judge of the credibility of witnesses and that the Appellate Court will not reverse their finding merely because had they been sitting as jurors, they might have decided differently.

In the case at bar, several witnesses, notably Inspector Manion, District Supervisor Manning, Agents Cass and McGuire, testified to several conversations had with the appellant and the witness Pon Jeung in *English* at 717 Grant Avenue. Yet both of these witnesses took the stand and denied that they spoke

English and had to be examined by the use of an interpreter. Inspector Manion testified that he had been in charge of the Chinatown Squad of the San Francisco Police Department for twenty-two years, the other witnesses are quite familiar with the Chinese, yet both the appellant and Pon Jeung flatly denied ever having conversed with them in English.

The familiar rule may be here invoked that if the jury distrusts the witness' testimony in any particular they are at liberty to reject all of his testimony.

Furthermore, a witness may be as thoroughly discredited by the inherent improbabilities of his testimony as by the direct testimony of other witnesses.

*In re Leslie,* 119 Fed. 406, 408.

Finally, may we respectfully call the Court's attention to something which cannot, as a matter of mere reporting, appear in the record but which, nevertheless, aided the jury in coming to their verdict. That is, that on more than one occasion the witnesses who claimed they could not speak English answered Government Counsel's question by motions of the head before the interpreter even interpreted the questions, clearly indicating that the witnesses were not telling the truth when they stated they could not speak English and had merely adopted this subterfuge to evade the seriousness of their admissions.

## CONCLUSION.

For the reasons stated we respectfully submit that the Court below did not err in denying appellant's motion for a directed verdict and that the evidence amply supports the verdict of the jury.

Dated, San Francisco, California,
May 22, 1944.

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